In the Supreme Court

OF THE

United States

OCTOBER TERM, 1940

No. 471

RUPERT N. DUNN,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

to the District Court of Appeal of the State of California,
Third Appellate District.

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to the District Court of Appeal of the State of California, Third Appellate District.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The petition of Rupert N. Dunn for a writ of certiorari to the District Court of Appeal of the State of California, in and for the Third Appellate District,

to review a judgment of that Court affirming his conviction in the Superior Court of the State of California, in and for the County of Humboldt, of the crime of grand theft, a felony, respectfully shows to Your Honors:

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

It is the contention of your petitioner that the statutes of the State of California under which he was tried and convicted deprived him of the right to be informed of the nature and cause of the accusation against him, and that a denial of this right is a denial of due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

In the year 1927, the Legislature of the State of California, in an attempt to amalgamate the crimes of larceny, embezzlement, false pretenses, and kindred offenses under the cognomen of "theft", amended Section 484 of the Penal Code of the State of California (Deering's Penal Code of the State of California, Bancroft Whitney Company, San Francisco, 1937, page 174), to read as follows:

> "Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his wealth or mercantile char-

acter and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft. In determining the value of the property obtained, for the purposes of this section, the reasonable and fair market value shall be the test, and in determining the value of services received the contract price shall be the test. If there be no contract price, the reasonable and going wage for the service rendered shall govern. For the purposes of this section, any false and fraudulent representation or pretense made shall be treated as continuing, so as to cover any money, property or service received as a result thereof, and the complaint, information or indictment may charge that the crime was committed on any date during the particular period in question. The hiring of any additional employee or employees without advising each of them of every labor claim due and unpaid and every judgment that the employer has been unable to meet shall be prima facie evidence of intent to defraud."

Section 489 (id. page 177), provides that grand theft (where the value of the money or property exceeds $200) is punishable by imprisonment in the State prison for not less than one, nor more than ten years.

Section 490a, added to the Code the same year (id. page 177), provides:

> "Whenever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall hereafter be read and interpreted as if the word 'theft' were substituted therefor."

Numerous other sections of the Penal Code of the State of California, untouched by amendment, define various and divers acts as being either larceny, or embezzlement. (Penal Code of California, Sections 494, 495, 496c, 502½, 504, 504a, 505, 506, 506a, 507, and 508.) In the interest of brevity these sections are printed with appropriate references, in the appendix.

Section 532 of the said Code (id. page 194), reads:

> "Every person who knowingly and designedly, by any false or fraudulent representation or pretense, defrauds any other person of money, labor, or property, whether real or personal, or who causes or procures others to report falsely of his wealth or mercantile character, and by thus imposing upon any person obtains credit, and thereby fraudulently gets possession of money or property, or obtains the labor or service of another, is punishable in the same manner and to the same extent as for larceny of the money or property so obtained."

Section 952 of the said Code (id. page 318), reads:

> *"In charging theft, it shall be sufficient to allege that the defendant unlawfully took the labor or property of another."*

Petitioner was prosecuted by an information filed by the District Attorney of Humboldt County in the Superior Court of that County for the crime of grand theft. Only two counts of the information were submitted to the jury by the trial Court, to-wit, counts 3 and 4, which charged respectively that petitioner did "wilfully, unlawfully, and feloniously steal, take

and carry away" the sums of $250 and $765. (Typewritten Transcript of Record, Volume I, page 2.)

Prior to the amendment, Section 484 defined larceny as the "felonious stealing, taking and carrying away" of the personal property of another. *Thus the information charged larceny and nothing else.*

At the opening of the trial, and before any evidence was taken, petitioner's counsel, on a statement by the District Attorney that he would rely for a conviction upon evidence tending to show petitioner's guilt of embezzlement and obtaining money by false pretenses, made a preliminary objection to the introduction of any such testimony, upon the ground that the information merely charged the larceny. (Typewritten Transcript, Volume I, page 41.) The trial Court overruled this objection on the authority of *People v. Plum,* 88 Cal. App. 575, 263 Pac. 862 (on rehearing 265 Pac. 322), the pertinent portions of which are printed in the appendix hereto, and which holds, in substance, that since under the provisions of Section 952 it is sufficient to charge that the defendant *"unlawfully took"* the property of another, the additional words "steal and carry away" in an information charging theft may be treated as surplusage, and that the accused might be convicted of either larceny or embezzlement, or of obtaining money by false pretenses. Thereupon, counsel for petitioner specifically urged that "the statutes of the State of California, as interpreted by the District Court of Appeal in the decision referred to by Your Honor, and in other decisions in so far as they permit the State to charge the defendant with one offense and proceed against

him for another, and that Section 952, and also Section 484 of the Penal Code are, and each of them is, unconstitutional and in violation of the rights of the defendant under the provisions of the Fourteenth Amendment to the Constitution of the United States, and particularly that portion of the said Fourteenth Amendment which provides that no State shall deprive any person of life, liberty, or property without due process of law; and in this behalf, the defendant further specifically raises in this, the trial Court, the contention that the provision of the Bill of Rights of the Constitution of the United States, which provides that in all criminal prosecutions the accused shall be entitled to be informed of the nature and cause of the accusation against him, is protected by the provisions of the said Fourteenth Amendment to the Constitution of the United States." (Typewritten Transcript Volume I, page 46.)

Again, Volume I, page 48, counsel said:

> "It is our contention, Your Honor, that the right to be informed of the nature and cause of the accusation is not merely protected by Article VI, the provisions of which were originally deemed as a limitation upon the power of the Federal Government and not upon the power of the States, but that it is likewise protected by the Fourteenth Amendment to the Constitution of the United States, which is a specified prohibition on the power of the States."

The trial Court, having denied the motion without specifically ruling on the federal question (Volume I, page 51), petitioner's counsel pressed the Court for a ruling:

"Mr. Herron: Now I think that keeps the record straight, Your Honor, with the exception of this one thing, that we believe that the Court, at this time, should rule, either favorably or adversely, on the federal question raised by the defendant.

The Court: Well I think holding that the information is good would cover all the points, federal, state, or otherwise. In other words, it is the opinion of the Court at this time, that the information is sufficient under section 484 of the Penal Code with reference to the crimes therein enumerated.

Mr. Herron: Well then, we ask the Court also to rule upon the contention that that section and section 952 are unconstitutional under the Fourteenth Amendment to the Constitution of the United States.

The Court: Very well, the Court will rule that the information is not unconstitutional under section 484 and section 952 as cited by counsel.

Mr. Herron: And the record will note the exception of the defendant to the ruling of the Court."

At the conclusion of the testimony, the trial Judge gave instructions to the jury defining all three of the offenses of larceny, embezzlement, and obtaining money by false pretenses, thus permitting them to convict upon any one of several utterly inconsistent theories. (Typewritten Transcript Volume III, page 1348, lines 8-20; page 1355, lines 4-20; page 1359, line 26; page 1361, line 6; page 1366, line 19; page 1371, line 3; page 1373, line 10.)

It will be noted that the trial Court repeatedly, and particularly in the last four paragraphs of the last

instruction, made use of the phrase "offense or offenses". (Typewritten Transcript Volume III, page 1372, line 3-page 1373, line 10.)

Thus petitioner might easily have been convicted because all of the jurors believed him guilty of *some* act constituting theft, though twelve, or even two of them, did not agree as to his guilt *of any one* of the fifteen different kinds of theft defined by the code.

The jury having brought in a verdict finding the defendant guilty on each of the counts submitted to them, counsel for petitioner, in addition to making a motion for a new trial, also moved in arrest of judgment on the ground of the failure of the information to charge any public offense, "and upon the further ground that Section 484 of the Penal Code of the State of California, and Section 952 of the Penal Code of the State of California are, and each of them is, unconstitutional and void under the provisions of the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall deprive any person of life, liberty or property without due process of law." (Typewritten Transcript Volume III, page 1377, lines 10-18.) This motion was denied by the trial Judge. (Volume I, Typewritten Transcript—Clerk's Transcript—page 29, line 18.)

The instructions given by the trial Judge are deemed excepted to under the law of the State of California, the statute (Penal Code Section 1176) providing that

> "When the charge of the Court has been taken down by a reporter, the questions presented in such instructions or charge need not be excepted to or embodied in a bill of exceptions, * * * and

any error in the action of the Court thereon may be reviewed on appeal in like manner as if presented in a bill of exceptions."

Following the imposition of sentence, petitioner duly appealed to the State District Court of Appeal for the Third Appellate District, the Court having appellate jurisdiction of the cause,—the decision of that Court being final unless the Supreme Court of the State within thirty days thereafter should order the cause transferred to itself for hearing and determination. (Constitution of California, Section 4c of Article VI.) The District Court of Appeal, in affirming the judgment of the lower Court, passed upon the federal question raised by petitioner, and, denying his claim that he was deprived of due process of law, used the following language:

> "It is urged that Sections 484 and 952 of the Penal Code are unconstitutional *as being in violation of the due process clause of the Constitution of the United States (Fourteenth Amendment),* in that *an information drawn thereunder gives the defendant no information as to the nature of the accusation against him.* This question was decided adversely to appellant in the case of People v. Robinson, 107 Cal. App. 211, where a hearing was denied by the Supreme Court. The motion in arrest of judgment was therefore properly denied." (Appendix, p. xiii.)

A petition for a rehearing in which the federal question was again raised, was denied without opinion by the District Court of Appeal (Transcript, Vol. III, p. 1415) and the State Supreme Court denied a petition for a hearing. (Vol. III, p. 1416.)

A certificate by the Presiding Justice of the District Court of Appeal sets forth that in the petition for a hearing in the Supreme Court, petitioner likewise raised the federal question. (Volume III, pages 1423-1424.)

STATEMENT PARTICULARLY DISCLOSING THE BASIS UPON WHICH IT IS CONTENDED THAT THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT IN QUESTION.

(a) The statutory provision believed to sustain the jurisdiction is Section 237 of the Judicial Code; U. S. C. A. Title 28, Section 344, Subdivision b.

(b) The date of the judgment of the trial court—December 6, 1939. The date of the judgment of the District Court of Appeal of the State of California for the Third Appellate District sought to be reviewed—July 2, 1940—rehearing denied July 17, 1940. Petition to have the cause heard and determined by the Supreme Court of the State of California after judgment in the District Court of Appeal denied by the Supreme Court July 30, 1940. (Transcript, Vol. I, Clerk's Trans., p. 29; Vol. III, pp. 1415, 1416.)

(c) That the nature of the case and the rulings of the Court were such as to bring the case within the jurisdictional provisions relied upon, is sufficiently set forth in the preceding summary statement of the matter involved, and from the above quoted language of the District Court of Appeal, in which it decided the federal question adversely to the contentions of petitioner. To comply with the requirements of Rule 12 (Paragraph 1) of this Court as we construe the same,

we append hereto copies of the opinion of the State Court delivered upon the rendering of the judgment sought to be reviewed, with the pertinent portions of the earlier opinion of the same Court in the case of *People v. Plum,* supra, in which the State statutes, the validity of which are challenged, were applied and construed by that Court.

(d) The cases believed to sustain the jurisdiction are in part as follows:

Keerl v. Montana, 213 U. S. 135, 29 S. Ct. 469, 53 L. ed. 634 (where the plea of once in jeopardy was held to present a federal question);

Chicago B. & Q. R. Co. v. Chicago, 166 U. S. 226, 241, 17 S. Ct. 581, 41 L. ed. 979, 986;

Herbert v. Louisiana, 272 U. S. 312, 316, 71 L. ed. 270, 272, 47 S. Ct. 103, 48 A. L. R. 1102;

Mooney v. Holohan, 294 U. S. 103, 55 S. Ct. 340, 79 L. ed. 791, 98 A. L. R. 406 (a conviction procured by perjured testimony violates due process);

Moore v. Dempsey, 261 U. S. 86, 67 L. ed. 543, 43 S. Ct. 265 (a conviction procured by threat of mob violence);

Tumey v. Ohio, 273 U. S. 510, 71 L. ed. 749, 47 S. Ct. 437, 50 A. L. R. 1243 (trial before a judge having a financial interest in the outcome is void for want of due process);

Holden v. Hardy, 169 U. S. 366, 389, 42 L. ed. 780, 18 S. Ct. 383;

Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55, 84 A. L. R. 527 (deprivation of right to Counsel);

Brown v. Mississippi, 274 U. S. 278, 80 L. ed. 682 (conviction void because confessions were obtained by torture);

Snyder v. Massachusetts, 291 U. S. 97, 105, 78 L. ed. 674, 54 S. Ct. 330, 90 A. L. R. 575;

Saunders v. Shaw, 244 U. S. 317, 61 L. ed. 1163, 37 S. Ct. 638;

Morrison v. California, 291 U. S. 82, 54 S. Ct. 281, 78 L. ed. 664 (holding void for want of due process; a statute requiring the accused to prove citizenship in a prosecution against an alleged alien for holding land);

Lanzetta v. New Jersey, 306 U. S. 454, 59 S. Ct. 618, 83 L. ed. 888 (holding violative of due process a conviction under statute void for uncertainty).

STATEMENT OF THE GROUNDS UPON WHICH IT IS CONTENDED THE QUESTIONS INVOLVED ARE SUBSTANTIAL.

(1) The right of an accused in a criminal case to be informed of the nature and cause of the accusation is one of those "fundamental principles of liberty and justice which lie at the base of our civil and political institutions and which cannot be denied without denying the due process of law." It is one of those "personal rights safeguarded by the first eight amendments against national action, which is also safeguarded against State action, because its denial would be a denial of due process of law."

(*Twining v. New Jersey,* 211 U. S. 78, 99, 53 L. ed. 97, 106, 29 S. Ct. 14, citing *Chicago B. & Q. R. Co. v. Chicago,* supra).

In *Powell v. Alabama,* supra, it is held that the right to the aid of Counsel guaranteed by the Sixth Amendment is likewise protected by the due process clause of the Fourteenth. The right to be informed of the nature of the accusation is also guaranteed by the Sixth Amendment, and is it any the less essential to due process?

Of what avail to the accused are counsel, even though learned in the law, if they are called upon to defend against an indictment which contains no statement of any of the essential ingredients of any crime known to the law, and under which the prosecution may prove any one of two-score offenses defined in the penal statutes?

> "When the constitutional provision requires that the accused be 'informed of the nature and cause of the accusation' it contemplates that he shall be so informed *by the indictment* in the particular case and not by a general statute, or statutes, applicable to all cases in a class. State v. Dougherty, 4 Or. 200, 204. The presumption of a knowledge of the law does not apply so as to enlarge the effect of the indictment. Otherwise it would suffice to notify an accused of the general name of the offense with which it is intended to charge him and then leave him to search the law books to ascertain what all of the possible essential ingredients of that offense are. 'The court and the accused are not to look further than the face of the indictment for the specification of the offense of which the latter can be convicted. They are not to consider each, every, all and singular the offenses described in the Penal Code, nor are they required to search the Code of Criminal Procedure to ascertain just how many incompatible

> crimes, the acts constituting which are not made to appear from the indictment, may be proved against the accused on the trial. They are relieved from this by the constitutional right of the "accused" to demand the nature and cause of the accusation against him.' Huntsman v. State, 12 Tex. Crim. 619, 635."
>
> *Territory v. Burns,* 27 Hawaii 253, 256.

(2) The California statute which permits the State to merely charge that the accused *"unlawfully took"* the property of another, and then convict him upon evidence that he has committed any one of fifteen different offenses (see Appendix, page xxiii, et seq.), gives him no information whatever as to the nature of the charge sufficient to prepare his defense or to plead prior acquittal or former jeopardy in a subsequent prosecution. It is too plain, we submit, to admit of any question whatsoever that the question as to whether the right to be informed of the nature and cause of the accusation guaranteed by the Sixth Amendment to the Constitution is also protected by the due process of law clause of the Fourteenth Amendment is not only a substantial, but an all-important federal question.

It is well stated of the provision in the Sixth Amendment that the accused is entitled to be informed of the nature and cause of the accusation against him: *"This is a reaffirmation of the essential principles of the common law,* and puts it beyond the power of either Congress or the Courts to abrogate them."

United States v. Potter, 56 Fed. 88.

It is true that the States have a right to regulate procedure in their own Courts, but this does not mean that they may dispense with constitutional requirements based upon the fundamental concepts of liberty. The State cannot make *any* process *due* process.

Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616.

Statutes permitting the conviction of the accused of embezzlement (the District Court of Appeal affirmed this conviction on the theory that the evidence showed embezzlement; Appendix, page xi) on an information charging larceny (as did the information in this case) have been held unconstitutional in a number of jurisdictions, *Howland v. State,* 32 Atl. (N. J.), 257; *State v. Harmon,* 106 Mo. 635, 18 S. W. 121; *Huntsman v. State,* supra; *Territory v. Burns,* 27 Haw. 253.

The general rule is thus stated in 31 *Corp. Jur.* 651:

> "It is within the power of the legislature under such a constitutional provision to prescribe the form of the indictment or information, and such form may omit averments regarded as necessary at common law. But the legislature, while it may simplify the form of an indictment or information, cannot dispense with the necessity of placing therein a distinct presentation of the offense containing allegations of all its essential elements."

It is well said in *Cooper v. State,* 15 Ala. App. 657, 75 So. 753:

> *"The constitutional right of the accused to demand the nature and cause of his accusation is not a technical right, but is fundamental and essential to the guaranty that no person shall be de-*

prived of his liberty except by due process of law, nor be twice put in jeopardy for the same offense."

In *State v. Crouse,* 117 Me. 363, 364, 104 Atl. 525, it is said:

> "The memorable and time-honored declaration that in all criminal proceedings the accused shall have the right to demand the nature and cause of the accusation, entitles him to insist that the facts alleged to constitute a crime shall be stated in the indictment with that certainty and precision of designation requisite to enable him to meet the exact charge and to plead the judgment, either of acquittal or conviction which may be rendered upon it, in bar of a later prosecution for the same offense."

In *People v. Marion,* 28 Mich. 255, 257, the Supreme Court of Michigan says:

> *"As every man is presumed to be innocent until proved to be guilty, he must be presumed also to be ignorant of what is intended to be proved against him except as he is informed by the indictment or information."*

To the same effect:

State v. Topham, 41 Ut. 39, 123 Pac. 288;
State v. McKenna, 24 Ut. 317, 320, 67 Pac. 815;
State v. Villa, 92 Vt. 121, 102 Atl. 935;
U. S. v. Cruikshank, 92 U. S. 542, 23 L. ed. 588;
Kaufmann v. United States, 282 Fed. 776;
United States v. Hess, 124 U. S. 583;
United States v. Bopp, 230 Fed. 721.

In the recent case of *Lanzetta v. New Jersey,* supra, this Court held a conviction under a statute which was so uncertain that it was impossible to ascertain what acts were within its prohibitions, a violation of due process of law, and we submit that an indictment or information must likewise be certain as to the act charged to have been committed, otherwise due process is infringed.

THE STAGE OF THE PROCEEDINGS AND THE MANNER IN WHICH THE FEDERAL QUESTIONS WERE RAISED.

These matters are set forth with appropriate reference to, and quotations from, the record in the summary statement of the matter involved and need not be repeated.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

The State Court has decided a federal question of substance not heretofore specifically determined by this Court, in a manner not in accord with the applicable decisions of this Court for the reasons heretofore stated of the grounds upon which it is contended that the questions involved are substantial, the restatement of which is unnecessary.

In view of the thoroughness of the foregoing dicussion of the grounds on which it is claimed that the questions involved are substantial, and the citation of the authorities under that heading, we deem a supporting brief unnecessary to the consideration of this petition, and omit the same in the interest of brevity.

Wherefore, your petitioner respectfully prays that a Writ of Certiorari issue out of and under the seal of this Honorable Court directed to the Honorable Justices of the District Court of Appeal of the State of California in and for the Third Appellate District, commanding them to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record of all proceedings in the cause entitled as above, and that the judgment of the said District Court of Appeal of the State of California may be reviewed by Your Honors and the judgment thereof reversed, and that your petitioner have such other and further relief as to this Honorable Court may seem meet and just and proper in the premises; and your petitioner will ever pray.

Dated, San Francisco, California,
September 23, 1940.

WILLIAM F. HERRON,
EDWARD A. CUNHA,
GEORGE C. W. EGAN,
HERBERT W. ERSKINE,
Attorneys for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for the petitioner in the above entitled cause and that, in my judgment, the foregoing petition is well founded in point of law, as well as in fact, and that said petition is not interposed for delay.

Dated, San Francisco, California,
September 23, 1940.

HERBERT W. ERSKINE,
Of Counsel for Petitioner and Member of the Bar of the Supreme Court of the United States.

(Appendices A and B Follow.)

Appendix A

OPINION OF STATE COURT.

District Court of Appeal
State of California
Third Appellate District

(Reported in 102 California Appellate Decisions (Advance Sheets), page 154; 104 Pac. (2d) Advance Sheets, page 119.)

Defendant was charged by an information in four counts with the crime of grand theft. (Section 484, Penal Code).

The first two counts were dismissed by the court. Count III charged in substance that "on or about the 12th day of December, 1938, * * * the defendant did * * * steal, take and carry away the sum of $250. * * * of the personal property of Fred M. Kay."

Count IV charged in substance that "on or about the 1st day of March, 1939, * * * the defendant did * * * steal, take and carry away the sum of $765.00 * * * of the personal property of Fred M. Kay."

After trial by jury the defendant was convicted upon Counts III and IV. This is an appeal from the judgment of conviction and from the order denying a new trial.

Fred M. Kay, the principal witness for the People in this case, had been county clerk of Humboldt County for nearly twenty-five years. Prior to that time he had been a deputy in that office for twelve years. At the time of the trial of the instant case

he was sixty-eight years of age. He had lived in Humboldt county practically all of his life. He ceased to be county clerk on March 14, 1939. Subsequently, on May 16, 1939, he was found guilty of embezzlement of public funds. The conviction was affirmed by this court. (People v. Kay, 34 Cal. App. (2d) 691).

During the summer of 1938, appellant discussed with Kay the subject of the Lander Hill Mining Company. Appellant, so Kay testified, stated that he had a typewritten report on the mine; that it was a very wonderful mine, mostly composed of silver ore, and situate near Austin, Nevada. On October 27th of the same year, the witness testified that the following conversation with appellant took place:

"* * * he said on October 27, 1938, he wanted some more money, and he said if I could raise a certain amount of money, I don't remember the exact amount now, that he would have 5000 shares of this Lander Hill Mining Company up here, and be able to turn it over to me the next day. And I asked him what we could do with that, and he says we could get some money on that stock; he says we could borrow money on it, plenty of money." The next day Kay paid appellant $465.00 on account of the deal. On December 12, 1938, he paid appellant the further sum of $250.00 for stock in said Company. The stock was never delivered to Kay, though he repeatedly demanded it, nor was the money returned. Kay stated that he had faith in appellant, who told him that he would be made president of the Company at a salary

of $500.00 per month. Appellant denied that any such payments were made to him, and stated that his reference to installing Kay as president of the Company was made in a joking manner. The amount paid on December 12th was borrowed, Kay testified, from W. T. Leroy. The latter corroborated that testimony.

On the theory of the admissibility of other similar transactions to prove a common scheme and design, and also the intent of defendant to commit the crime charged, Kay was permitted to testify concerning a number of other transactions between appellant and him, starting with the year 1933. The first was an investment of funds by Kay in a scheme connected with a patent three-dimension camera lens. Appellant received the money but never received any stock. The next was a timber deal, in which money was paid to appellant. Kay received nothing for his investment. The next was a paint deal. Appellant told Kay that a Los Angeles woman had a formula for paint to be used on the bottom of ships. Kay invested some funds in the scheme with appellant, and that was the end of it. The next enterprise was a corporation to build airplanes which was being promoted by appellant and other parties. The result was the same as in the other proposals. Kay received nothing for his money. The next was a mining venture. Appellant said he and several others had taken over a mine in Siskiyou County; that a corporation had been formed, and stock would be issued; that Kay would get a certain percentage of such stock. No stock was ever

delivered. The next scheme was a chemical plant to grind up redwood stumps. Kay gave appellant funds to be used in the enterprise. The next was a powder deal. Appellant introduced to Kay a man who had invented a certain kind of powder, and stated that a corporation would be formed to manufacture it. Kay gave appellant funds to be invested in the stock. No stock was ever delivered. The foregoing facts appear in the testimony of Kay. All evidence of former transactions between Kay and appellant, except the camera deal, was stricken out on motion of defendant.

It is contended that the evidence is insufficient to establish any offense, for the reason that the testimony of Kay is so inherently improbable that it must be rejected as a matter of law. Appellant points out that the payments made by Kay to appellant were established by *oral* evidence alone. That a person of ordinary intelligence would require a written receipt under such circumstances. Therefore, appellant urges, the whole story of Kay is utterly worthless as a matter of law. The failure to demand and receive a receipt, appellant contends, coupled with the bad character of Kay, stamp the testimony as inherently improbable. The rule, where an attack of this character is made upon the credibility of a witness, is set forth by this court in the case of People v. Jefferson, 31 Cal. App. (2d), 562-566:

> "The justices of an appellate court should not substitute their judgment for the conclusions of the jury and the trial judge and reverse a cause on the ground that the evidence of the prosecuting witness is inherently improbable, unless it is

> so clearly false and unbelievable that reasonable minds may not differ in that regard. To justify a reversal of a judgment on that ground it should clearly appear that the verdict is the result of passion and prejudice."

Applying the foregoing rule, we cannot say that the story of witness Kay is inherently improbable, and that the verdict therefore lacks any substantial support. The fact that the witness had been convicted of a felony was a proper ground for impeachment—(Section 2051 C.C.P.)—but it was for the jury to decide whether or not they would, in spite of his criminal record, still believe him. This witness did many acts which most normal people would not have done, but that does not render his testimony unworthy of belief. Just because the average person would have demanded and received a receipt for any money paid out under such circumstances, is no justification for condemning as false the testimony of one who did not exact a receipt under the circumstances. These are essentially questions for the consideration of the jury. The credibility of the witness is not a question of law in this case. The case of People v. Lamson, 1 Cal. (2d), 648, merely restates the familiar rule that where there is no substantial evidence to support a verdict, it is the duty of an appellate court to set it aside. The evidence in that case was entirely circumstantial, and the court followed the general rule by holding that where circumstantial evidence is relied upon for a conviction, and where every circumstance relied upon as incriminating is equally compatible

with innocence, there is a failure of proof necessary to sustain a conviction, and the question presented is one of law for the court. Here, the People rely, not upon circumstantial evidence, but upon direct evidence. It is not a matter of links in the chain of evidence, but whether or not the words of a witness are to be given any credence. It cannot be said that the Lamson case in any manner abrogates the old rule that the jury are the sole judges of the facts and of the credibility of the witnesses, and that if there is any substantial evidence to support a verdict, it will not be disturbed by an appellate court. We find such evidence in the record before us.

Appellant contends that "no conviction of either embezzlement or false pretenses can be sustained because the information charges larceny and nothing else". He states that one cannot be charged with one crime and convicted on a showing that he has committed another. Under the definition of *theft,* there is included the crimes of larceny, obtaining money, labor or property by false pretenses, and embezzlement. (Penal Code, Section 484). Section 952 of that Code provides that "* * * In charging theft it shall be sufficient to allege that the defendant 'unlawfully took' the labor or property of another". It is clear that the information here meets the requirement of the latter section. The question is not a novel one, but has been definitely settled adversely to the contention of appellant in the following cases:

People v. Fewkes, 214 Cal. 142; People v. Plumb, 88 Cal. App. 575; People v. Mason, 12 Cal. App. (2d)

84; People v. McNeil, 27 Cal. App. (2d) 352; People v. Robinson, 107 Cal. App. 211. We therefore hold that under the indictment before us, if the evidence showed defendant to have committed any or all of the three included offenses mentioned above, he could have been convicted of grand theft. The information as set forth above, charges the said three offenses under the express statutory form set forth in Section 952 of the Penal Code. The only case relied upon by appellant is People v. Walther, 27 Cal. App. (2d) 583. There, the defendant was convicted under a count in an information which attempted to set forth the crime of obtaining money by false pretenses. (Penal Code, Section 532). This court held that the information did not charge that crime, for the reason that it failed to specify any act or statement of the defendant constituting the alleged crime. No attempt was made in that case to charge the crime of theft under the provisions of Section 952 of the Penal Code. Neither did the court there take into consideration the provisions in said section that "It, (the count in the information or indictment), may be in the words of the enactment describing the offense." The discussion of this point may very properly be concluded with the following excerpt from People v. Plumb, supra:

> "Under the pretense of informing the defendant of the nature of the charge against which he was called upon to defend, it was necessary, at the ancient common law, to describe the means by which the homicide was committed, and the nature and extent of the wound and its precise locality;

from which it necessarily followed that a trifling variance between the proof and the allegation frequently defeated a conviction, no matter how manifest the guilt of the defendant. *It was a long time before legislators and judges discovered that this rule had nothing but the most flimsy pretext to support it. If the defendant is guilty, he stands in need of no information to be derived from a perusal of the indictment, as to the means used by him in committing the act or the manner in which it was done, for as to both, his own knowledge is quite as reliable as any statements contained in the indictment. If he is not guilty, the information could not aid in the preparation of his defense.* (People v. King, 27 Cal. 507-510 (87 Am. Dec. 95; People v. Cronin, 34 Cal. 191, 200; People v. Fowler, 178 Cal. 657, 661 (174 Pac. 892).)"

Appellant next complains of a ruling of the trial court which denied him the right to make a statement at the close of the opening statement by the prosecution, but which permitted him to make such a statement when the prosecution had rested. He cites no authorities. There is nothing in the "Order of the Proceedings" set forth in the Penal Code, (Sec. 1093), which gives the defendant the right for which he here contends. It was a matter committed to the sound discretion of the trial court, and he cannot say here that such discretion was abused. Neither can we find that the ruling was prejudicial to defendant.

It is contended that the trial court erred in refusing to exclude any evidence tending to show the com-

mission of the offenses of embezzlement and obtaining money by false pretenses, and upon the ground that the indictment stated but one offense—larceny. This question has been fully discussed above. But one crime was expressly charged in each count—theft. Under that charge, evidence of the included offenses was clearly admissible.

During the testimony of Kay, the trial court admitted in evidence the following writing:

> "October 27, 1938. Jack told me today that tomorrow I would receive 5,000 shares of ..... stock, par value $100.00 per share and that I could transfer 2500 shares to ....., and receive $150.00; that within thirty days if I want to sell the remaining 2500 shares that I can get from a hundred and fifty thousand to two hundred thousand dollars for them. Fred M. Kay."

The witness testified that he made the memorandum on the day he had a conversation with defendant. While the witness had the right to refresh his memory from such memorandum, it is doubtful if the document itself was admissible as evidence. It is unnecessary to discuss the matter further, as it appears that the defendant, prior thereto, testified to all the facts contained in the memorandum. An identical situation arose in the case of People v. Allen, 37 Cal. App. 180-188, where this court said:

> "Under Section 2047 of the Code of Civil Procedure, a witness may 'refresh his memory respecting a fact, by anything written by himself,

> or under his direction, at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing.' But where the witness can and does testify fully as to the facts without resort to his memorandum, we do not think he can be corroborated by the introduction of his memorandum. We think, however, that the ruling was without prejudice. Section 4½ of Article VI of the Constitution would seem to apply here."

We can see no prejudice resulting from the ruling.

During the examination of Kay, on rebuttal, and over the objection of appellant, the trial court admitted in evidence a written memorandum made by Kay containing numerous items of money and a date opposite each item. The witness testified that they represented payments made to appellant in connection with a number of transactions between them. Elsewhere, the witness had testified that about one-half of his income, covering several years, and amounting to $7500.00, had been paid to appellant. The items admitted covered the same ground, but contained more detail. Assuming that the list of items was not admissible, no prejudice resulted from the ruling. The matter was already substantially in evidence, though not in the same form. What we have said also applies to a small memorandum book containing items showing similar payments by the witness to appellant. All of such items were included in the $7500.00 total mentioned.

It is contended that the evidence is insufficient to prove theft or any of the crimes included in the charge, to-wit: larceny, obtaining money by false pretenses, and embezzlement. We are satisfied that the evidence sustains a conviction of theft committed by means of embezzlement. The latter offense is defined as "the fraudulent appropriation of property by the person to whom it has been entrusted." (Penal Code Sec. 503). The jury could reasonably conclude from the evidence that the sums of $250.00 and $765.00 were entrusted to appellant for the purpose of purchasing stock in Lander Hill Mining Company, and that he fraudulently appropriated such money. The stock was never purchased or delivered. There is evidence in the record of a similar scheme used by appellant to get money from Kay. It may be designated as the "Griffith Camera Lens" deal, and is mentioned above. There is also the testimony of parties who loaned money to Kay, which tends to corroborate his testimony. According to the record, Kay entrusted money to appellant on two occasions to be used for the purchase of stock in Lander Hill Mining Corporation. The stock was never delivered, nor was the money returned. In our opinion a plain case of embezzlement was made out. Defendant acted as agent for Kay, and it was his duty to use the money entrusted to him in payment of the stock. The following cases, based upon similar transactions, hold that embezzlement was the proper charge to make: People v. Meadows, 92 N.E. 128—199 N.Y. 1; State

v. Monahan, 249 Pac. 566, ... Nevada .....; State v. Cooke, 278 Pac. 936, ... Ore. ..... Appellant urges that the testimony shows that the money was not handed to appellant for any specific purpose; hence the crime of embezzlement was not proven. He relies upon a statement made by Kay on a former occasion, from which the jury might reasonably understand that the use to which the money was to be applied was not mentioned when the payments were made. On the other hand, at the trial of this action, Kay testified that appellant said the stock would be delivered "the next day". If Kay's testimony on the point was contradicted by a former statement, it was still a matter for the jury to say whether he was telling the truth or not in testifying before them, and we cannot disturb any conclusion which they may have reached on the question of the credibility of the witness.

It is contended that evidence of former transactions between the parties was inadmissible. All testimony of that character, except that relating to the camera deal, was stricken out on motion of defendant. We believe that all of such evidence was admissible. It covered a period of several years, and clearly disclosed a scheme or design upon the part of appellant to mulct Kay of his money. Such evidence is justified under the rule that:

> "Where several crimes are connected as part of one scheme or plan, all of the same general character, and tending to the same common end, they may be given in evidence to show the process or motive and design leading up to the particular

> crime for which the prisoner is being tried, and thus directly tending to show logically that the crime in question was a part of such common scheme. If the general crimes are part of a chain of cause and in consequence so linked as to be necessarily connected with the system or general plan, they are admissible." (8 Cal. Juris., page 69, Sec. 173).

This rule was applied in People v. Ruef, 14 Cal. App. 576. It is very thoroughly discussed in People v. McGill, 82 Cal. App. 98.

It is urged that the District Attorney was guilty of prejudicial misconduct. After an examination of the record, we cannot say that the District Attorney went beyond the limit of propriety and fairness, or that he did anything to wilfully injure or prejudice the defendant in the eyes of the jury. (People v. Wiley, 97 C.A.D. 845-847).

It is urged that Sections 484 and 952 of the Penal Code are unconstitutional as being in violation of the due process clause of the Constitution of the United States, (Fourteenth Amendment), in that an information drawn thereunder gives the defendant no information as to the nature of the accusation against him. This question was decided adversely to appellant in the case of People v. Robinson, 107 Cal. App. 211, where a hearing was denied by the Supreme Court. The motion in arrest of judgment was therefore properly denied.

Other points are raised as grounds for reversal. We have examined them and find such contentions are

so obviously without merit as to require no discussion of them.

The judgment and order denying motion for new trial are, and each of them is, affirmed.

Tuttle, J.

We concur:
Thompson, J.
Pullen, P. J.

Filed July 2, 1940,
Cavins Hart, Clerk.

Appendix B

PERTINENT EXCERPTS FROM THE OPINION OF THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT IN PEOPLE v. PLUM, 88 CAL. APP. 575, 263 PAC. 862, 265 PAC. 332.

"Appellants contend that under the provisions of section 484 of the Penal Code theft 'may be committed in four different ways'; that the information charges 'theft by asportation' and that 'the crime proved is that of obtaining property under false pretenses, which, under section 484 . . . is the third method, or mode . . . of committing theft.' Section 484 was amended at the last session of the legislature (Stats. 1927, p. 1046, sec. 1), for the purpose of avoiding such contentions as appellants make. In so far as applicable to the facts of this case it reads as follows:

" 'Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor, or real or personal property, or who causes or procures others to report falsely of his wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money or property or obtains the labor or service of another, is guilty of theft.'

"At the same session section 952 was amended (Stats. 1927, p. 1043) to provide: 'In charging theft it shall be sufficient to allege that the defendant un-

lawfully took the property of another.' If the words 'steal and carry away' were omitted from the information it would be in the precise form prescribed by the statute. It is not perceived that the defendants have suffered any possible prejudice from the use of those words in the charge and they may be treated as surplusage. Under similar provisions of the statutes of Massachusetts it is said that the effect 'is to put it beyond a doubt that the former crimes of larceny, embezzlement, and the obtaining of property by false pretenses, are now merged into the one crime of larceny . . . This legislation was intended to do away with the possibility of a criminal indicted for one of the three crimes mentioned escaping punishment by reason of its being afterwards found that his crime was technically one of the other two mentioned. A typical case of this kind is Commonwealth v. O'Malley, 97 Mass. 584. In that case the defendant had obtained by a trick possession of the money of an ignorant woman for a temporary purpose, and had fraudulently converted it to his own use. He had been prosecuted for larceny, but had obtained an acquittal because the judge before whom he was tried believed his crime to have been embezzlement. He was then indicted for embezzlement, and was convicted. But it was held by this court that his offense was really larceny and not embezzlement, and he was thus enabled wholly to escape punishment. It was the object of the legislature to prevent for the future similar scandals in the administration of justice, by doing away with the merely technical difference between

three cognate and similar offenses. The only way in which this reformatory intent can be effectuated is to allow the jury, upon the material facts which are the ground of a charge of larceny, to consider whether these facts show a taking of money or other property, by trespass from the possession of its owner, a fraudulent conversion of it while properly in the possession of the wrongdoer, or an obtaining of it by criminal false pretenses, . . . and in either of these cases to convict of larceny.' (Commonwealth v. King, 202 Mass. 379, 388 (88 N. E. 454).) Adapting the language of the King case, the effect of section 484 of the Penal Code is that the former crimes of larceny, embezzlement, and obtaining property by false pretenses are merged into the one crime of theft. A statutory form of charging such crime of larceny, substantially as provided by section 952, was upheld in Commonwealth v. Farmer, 218 Mass. 507 (106 N. E. 150), and Commonwealth v. Carver, 224 Mass. 42 (112 N. E. 481). In the Farmer case, where the defendants had obtained property by false representations, it is said: 'The indictments in all counts followed the short forms set forth in the criminal pleading act, R.L., c. 218. The constitutionality of the statute in this respect has been sustained in several decisions. It now is unnecessary to do more than summarize the conclusions reached. The word "steal" used in the indictment for larceny has become a term of art and includes the criminal taking of personal property either by larceny, embezzlement, or false pretenses . . . The provisions of R. L., c. 218, par. 39, require a bill of

particulars setting out adequate details where the indictment alone does not sufficiently inform the defendants, and this as a matter of right.' In People v. Hanaw, 107 Mich. 337 (65 N. W. 231), it is said: 'We think that it is within the power of the legislature to prescribe the form of indictments, keeping in view the constitutional right asserted in this case; and where, as in embezzlement, a defendant has a right to have the charge made certain by examination or by bill of particulars, it cannot be said that he is not informed of the nature of the charge.' (See, also, Commonwealth v. Bennett, 118 Mass. 443, 452; Commonwealth v. Wakelin, 230 Mass. 567 (120 N. E. 209), and State v. Hodgson, 66 Vt. 134 (28 Atl. 1089).) Sections 870 and 925 of the Penal Code require that the testimony in a criminal case taken at a preliminary examination or given before a grand jury be taken down by a stenographic reporter and, in the event of the commitment of the defendant for trial or his indictment, that he be furnished with a transcript thereof. Such transcript, together with the indictment or information, certainly informs the defendant of the nature of the charge against him as fully as would a bill of particulars."

"A petition for a rehearing of this cause was denied by the district court of appeal on February 21, 1928, and the following opinion then rendered thereon:

"FINCH, P. J.—In their petition for a rehearing the appellants, referring to the last sentence of section 952 of the Penal Code (Stats. 1927, p. 1043), quoted in the original opinion, say: 'The enactment,

providing that the allegation of "unlawfully took" shall be sufficient to charge all the acts constituting theft, . . . not only fails to allege the elements of the crime of theft, but alleges an act which might and ordinarily does not constitute a crime at all.' Section 952, however, must be read in connection with section 951, both enacted at the same session of the legislature. Section 951 provides:

"'An indictment or information may be in substantially the following form: . . . The grand jury (or the district attorney) of the county of....., hereby accuses A. B. of a felony (or misdemeanor), to-wit: (giving the name of the crime, as murder, burglary, etc.), in that on or about the ..... day of....., 19....., in the county of....., State of California he (here insert statement of act or omission, as for example, "murdered C. D.").'

"The information in this case, the charging part of which is set out in the original opinion, is in substantial compliance with the prescribed form, and it is clear that 'grand theft' always constitutes a crime. In an early case it was said: 'Our criminal code was designed to work the same change in pleading and practice in criminal actions which is wrought by the Civil Code in civil actions. Both are fruits of the same progressive spirit which, in modern times, has endeavored at least to do away with the mere forms and technicalities of the common law which were productive of no good, and frequently brought the administration of justice into contempt by defeating its ends. Under the pretense of informing

the defendant of the nature of the charge against which he was called upon to defend, it was necessary, at the ancient common law, to describe the means by which the homicide was committed, and the nature and extent of the wound and its precise locality; from which it necessarily followed that a trifling variance between the proof and the allegation frequently defeated a conviction, no matter how manifest the guilt of the defendant. It was a long time before legislators and judges discovered that this rule had nothing but the most flimsy pretext to support it. If the defendant is guilty, he stands in need of no information to be derived from a perusal of the indictment, as to the means used by him in committing the act or the manner in which it was done, for as to both his own knowledge is quite as reliable as any statements contained in the indictment. If he is not guilty, the information could not aid in the preparation of his defense.' (People v. King, 27 Cal. 507, 510 (87 Am. Dec. 95); People v. Cronin, 34 Cal. 191, 200; People v. Fowler, 178 Cal. 657, 661 (174 Pac. 892).) From purely theoretical considerations it might be exceedingly important for the indictment or information to set forth the manner in which the alleged murder was committed and the means by which it was accomplished, thereby informing the defendant of the particular facts against which he will be required to defend at the trial. Theoretically, a defendant may learn during the progress of the trial, for the first time, that the prosecution relies for a conviction upon proof that the alleged murder was committed by means of poisoned candy sent from a

distant state, by some subtle process or means at or near the scene of the crime, or through an accomplice, but experience has demonstrated that, from a practical standpoint, the rule requiring an indictment or information to set forth such particulars has 'nothing but the most flimsy pretext to support it,' and it is now 'the settled law of this state that it is sufficient to charge the offense of murder in the language of the statute defining it, whatever the circumstances of the particular case.' (People v. Witt, 170 Cal. 104, 107 (148 Pac. 928).) There may be technical objections to the short form of indictment or information under discussion, but when a defendant charged with grand theft as defined by section 484, has been furnished a copy of all the testimony taken at the preliminary examination or given before the grand jury, a rule requiring the indictment or information to state more than is required by sections 951 and 952 would have 'nothing but the most flimsy pretext to support it.' The extreme technicalities of the old common law are no longer followed in the English practice. The English Larceny Act, 1916, provides for a short form of indictment in charging simple larceny and more particular averments in a charge of obtaining property by false pretenses. (Archbold's Criminal Pleading, Evidence & Practice, 25th ed., 491, 669.) 'The distinction between larceny and obtaining by false pretenses is now little more than academic, because of the provisions of 6 & 7 Geo. 5, C. 50, s. 44, sub. ss. 3, 4.' 'On the trial of an indictment for stealing the jury may . . . find the

defendant guilty of embezzlement or of fraudulent application or disposition, as the case may be. . . . If on the trial of any indictment for stealing it is proved that the defendant took any chattel, money, or valuable security in question in any such manner as would amount in law to obtaining it by false pretenses with intent to defraud, the jury may acquit the defendant of stealing and find him guilty of obtaining the chattel, money, or valuable security by false pretenses, and thereupon he shall be liable to be punished accordingly.' "

"A petition by appellants to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on March 22, 1928.

"All the Justices present concurred."

CALIFORNIA STATUTES REFERRED TO BUT NOT QUOTED IN PETITION OR BRIEF.

(The figures hereafter appearing in parentheses refer to the pages of Deering's Penal Code of California, Bancroft Whitney Company, San Francisco, 1937.)

Section 494 (178):

"*Written instruments completed but not delivered.* All the provisions of this chapter apply where the property taken is an instrument for the payment of money, evidence of debt, public security, or passage ticket, completed and ready to be issued or delivered, although the same has never been issued or delivered by the makers thereof to any person as a purchaser or owner."

Section 495 (178):

"*Fixture or part of realty severed at time of taking.* The provisions of this chapter apply where the thing taken is any fixture or part of the realty, and is severed at the time of the taking, in the same manner as if the thing had been severed by another person at some previous time."

Section 496c (181):

"*Copying information relating to title to realty without consent of owner: Inducement to copy or receipt of copy: Contents of paper declared to be property: Determination of value.* Any person who shall copy, transcribe, photograph or otherwise make a record or memorandum of the contents of any private and

unpublished paper, book, record, map or file, containing information relating to the title to real property or containing information used in the business of examining, certifying or insuring titles to real property and belonging to any person, firm or corporation engaged in the business of examining, certifying, or insuring titles to real property, without the consent of the owner of such paper, book, record, map or file, and with the intent to use the same or the contents thereof, or to dispose of the same or the contents thereof to others for use, in the business of examining, certifying, or insuring titles to real property, shall be guilty of theft, and any person who shall induce another to violate the provisions of this section by giving, offering, or promising to such another any gift, gratuity, or thing of value or by doing or promising to do any act beneficial to such another, shall be guilty of theft; and any person who shall receive or acquire from another any copy, transcription, photograph or other record or memorandum of the contents of any private and unpublished paper, book, record, map or file containing information relating to the title to real property or containing information used in the business of examining, certifying or insuring titles to real property, with the knowledge that the same or the contents thereof has or have been acquired, prepared or compiled in violation of this section shall be guilty of theft. The contents of any such private and unpublished paper, book, record, map or file is hereby defined to be personal property, and in determining the value thereof for the purpose

of this section the cost of acquiring and compiling the same shall be the test."

Section 502½ (183):

"*Removal of structures or fixtures from mortgaged real property without consent.* Every person who, after mortgaging or encumbering by deed of trust any real property, and during the existence of such mortgage or deed of trust, or after such mortgaged or encumbered property shall have been sold under an order and decree of foreclosure or at a trustee's sale, and with intent to defraud or injure the mortgagee or the beneficiary or trustee, under such deed of trust, his representatives, successors or assigns, or the purchaser of such mortgaged or encumbered premises at such foreclosure or trustee's sale, his representatives, successors or assigns, takes, removes or carries away from such mortgaged or encumbered premises, or otherwise disposes of or permits the taking, removal or carrying away or otherwise disposing of any house, barn, windmill, water tank, pump, engine or other part of the freehold that is attached or affixed to such premises as an improvement thereon, without the written consent of the mortgagee or beneficiary, under deed of trust, his representatives, successors or assigns, or the purchaser at such foreclosure or trustee's sale, his representatives, successors or assigns, is guilty of larceny and shall be punished accordingly."

Section 504 (185):

"*Fraudulent appropriation or secretion of property by officer, servant or agent of state or subdivision or*

public or private corporation, association or society. Every officer of this state, or of any county, city, city and county, or other municipal corporation or subdivision thereof, and every deputy, clerk, or servant of any such officer, and every officer, director, trustee, clerk, servant, or agent of any association, society, or corporation (public or private), who fraudulently appropriates to any use or purpose not in the due and lawful execution of his trust, any property which he has in his possession, or under his control by virtue of his trust, or secrets it with a fraudulent intent to appropriate it to such use or purpose, is guilty of embezzlement."

Section 504a (185):

"*Fraudulent removal, concealment or disposition of personalty held under lease or unfulfilled contract of purchase.* Every person who shall fraudulently remove, conceal or dispose of any goods, chattels or effects, leased or let to him by any instrument in writing, or any personal property or effects of another in his possession, under a contract of purchase not yet fulfilled, and any person in possession of such goods, chattels, or effects knowing them to be subject to such lease or contract of purchase who shall so remove, conceal or dispose of the same with intent to injure or defraud the lessor or owner thereof, is guilty of embezzlement."

Section 505 (185):

"*Fraudulent appropriation by carrier.* Every carrier or other person having under his control per-

sonal property for the purpose of transportation for hire, who fraudulently appropriates it to any use or purpose inconsistent with the safe-keeping of such property and its transportation according to his trust, is guilty of embezzlement, whether he has broken the package in which such property is contained, or has otherwise separated the items thereof, or not."

Section 506 (185):

"*Fraudulent appropriation or secretion by person entrusted with or controlling property for use of another: Misappropriation by contractor: Payment of laborers and materialmen declared use of contract price.* Every trustee, banker, merchant, broker, attorney, agent, assignee in trust, executor, administrator, or collector, or person otherwise entrusted with or having in his control property for the use of any other person, who fraudulently appropriates it to any use or purpose not in the due and lawful execution of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, and any contractor who appropriates money paid to him for any use or purpose, other than for that which he received it, is guilty of embezzlement, and the payment of laborers and materialmen for work performed or material furnished in the performance of any contract is hereby declared to be the use and purpose to which the contract price of such contract, or any part thereof, received by the contractor shall be applied."

Section 506a (186):

"Collector deemed agent or person and punishable under preceding section: Word defined. Any person who acts as collector, or acting in any capacity in or about a business conducted for the collection of accounts or debts owing by another person, and who violates the provisions of section five hundred six of the Penal Code, shall be deemed to be an agent or person as defined in said section five hundred six of the Penal Code, and subject for a violation of the provisions of said section five hundred six of the Penal Code, to be prosecuted, tried, and punished in accordance therewith and with law.

"And the word collector herein set forth shall also include and be held to mean every such person who collects, or who has in his possession or under his control property or money for the use of any other person, whether in his own name and mixed with his own property or money, or otherwise, or whether he has any interest, direct or indirect, in or to such property or money, or any portion thereof, and who fraudulently appropriates to his own use, or the use of any person other than the true owner, or person entitled thereto, or secrets such property or money, or any portion thereof, or interest therein not his own, with a fraudulent intent to appropriate it to any use or purpose not in the due and lawful execution of his trust."

Section 507 (187):

"Fraudulent conversion or secretion of property by bailee, tenant, lodger or attorney in fact. Every per-

son entrusted with any property as bailee, tenant, or lodger, or with any power of attorney for the sale or transfer thereof, who fraudulently converts the same or the proceeds thereof to his own use or secretes it or them with a fraudulent intent to convert to his own use, is guilty of embezzlement."

Section 508 (187):

"*Fraudulent appropriation or secretion of property by clerk, agent or servant.* Every clerk, agent, or servant of any person who fraudulently appropriates to his own use, or secretes with a fraudulent intent to appropriate to his own use, any property of another which has come into his control or care by virtue of his employment as such clerk, agent, or servant, is guilty of embezzlement."

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 471

RUPERT N. DUNN,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the District Court of Appeal of the State of California, in and for the Third Appellate District, affirming the judgment of conviction, is reported in the case of *People* vs. *Dunn* in 102 Cal. App. Dec. (Advance Sheets), 154; 104 Pac. (2d) (Advance Sheets) 119.

The petition for rehearing was denied by the District Court of Appeal of the State of California in and for the Third Appellate District, on July 17, 1940, no opinion being filed.

The petition for hearing in the Supreme Court of California, after decision in the District Court

of Appeal of the State of California in and for the Third Appellate District, was denied on July 30, 1940, no opinion being filed.

STATUTES INVOLVED

Petitioner herein was convicted after trial by jury of the crime of grand theft, a felony (California Penal Code, Section 484).

STATEMENT OF THE MATTER INVOLVED

Petitioner's sole contention here is that section 484 and section 952 of the Penal Code of California are unconstitutional in that they violate the due process clause of the Federal Constitution.

As will be pointed out, *infra,* section 484 of the Penal Code of California was amended in 1927, amalgamating the three closely related crimes of larceny, embezzlement and obtaining money under false pretenses under the crime of *theft.*

Section 489 defines grand theft (over $200).

Section 490a provides:

> "Wherever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall hereafter be read and interpreted as if the word 'theft' were substituted therefor."

Section 952 thereof reads:

> "In charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has

committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused. In charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another."

Therefore, under the California statutes, all that is necessary is an allegation in the information that "defendant *took* the property of another" (describing it).

The relevant portion of the information in the instant case charged as follows:

> "Count III charged in substance that 'on or about the 12th day of December, 1938 * * * the defendant did * * * steal, take and carry away the sum of $250.00 * * * of the personal property of Fred M. Kay.'
>
> Count IV charged in substance that 'on or about the 1st day of March, 1939 * * * the defendant did * * * steal, take and carry away the sum of $765.00 * * * of the personal property of Fred M. Kay.' "

Petitioner urges that he was denied due process of law under the Federal Constitution; that the acts of the State of California in amalgamating these three felonies in one statute (section 484,

Penal Code) under the heading of *theft,* and charging petitioner in an information reciting that he "took" the property of another (section 952, Penal Code) are in violation of his constitutional rights to be informed of the nature of the charges against him.

I

Sections 484 and 952 of the Penal Code of California Are Not Violative of the Due Process Clause of the Federal Constitution

At the outset it will be observed that the information by which petitioner was charged was clearly within the language of the statutes, *supra.* Therefore, there is no question here involved of the uncertainty of the language of the information. The sole question here is whether or not the State of California had a legal right to adopt sections 484 and 952 of the Penal Code as a portion of its criminal procedural laws.

In the instant decision the highest courts of California answered petitioner's contention as follows:

> "It is urged that Sections 484 and 952 of the Penal Code are unconstitutional as being in violation of the due process clause of the Constitution of the United States, (Fourteenth Amendment), in that an information drawn thereunder gives the defendant no information as to the nature of the accusation against him. This question was decided adversely to appellant in the case of *People v. Robinson,* 107 Cal. App.

211, where a hearing was denied by the Supreme Court. The motion in arrest of judgment was therefore properly denied." (*People* vs. *Dunn,* P. xiii of Appendix A, Petition for Certiorari herein.)

Before discussing the case of *People* vs. *Robinson, supra,* respondent would like to call the attention of this Court to the California Supreme Court case of *People* vs. *Myers,* 206 Cal. 480; 275 Pac. 219, decided in 1929, two years after the statutes in question had been operating. The Court there says:

"The amendment to section 484, in connection with other cognate legislation such as the amendments to sections 951 and 952 of the Penal Code (Stats. 1927, p. 1043), is designed not only to simplify procedure but also to relieve the courts from difficult questions arising from the contention that the evidence shows the commission of some other of these crimes than the one alleged in the indictment or information, a contention upon which defendants may escape just conviction solely because of the border line distinction existing between these various crimes.

The conclusion we have announced has heretofore either been expressly or impliedly given forth in the following cases: *People* v. *Plum,* 88 Cal. App. 575 (263 Pac. 862); *People* v. *Giron,* 94 Cal. App. 53 (270 Pac. 462). In the latter case the sole ground of appeal was that the information did not charge a public offense for the reason that under the amendments to the Penal

Code adopted in 1927 there is no such thing as larceny. The information was not amended. After discussion, Mr. Justice Conrey disposes of the question as follows: 'So far as the new definition of larceny is concerned, the change of name is one of form and not of substance. The amendments did not wipe out the common-law definition of larceny, nor did they destroy the universal meaning of the word wherever English is spoken, that larceny is a form of theft. To think otherwise would be to defy common sense.' "

In the case of *People* vs. *Bratton,* 125 Cal. App. 337; 14 Pac. (2d) 125, we find this language, at page 341:

"Since the amendment of section 484 of the Penal Code (Stats. 1927, p. 1046) the crimes of larceny, embezzlement and false pretenses have been included within the crime of theft. In the case of *People* vs. *Myers,* 206 Cal. 480 (275 Pac. 219), it was held that this amendment was designed to simplify procedure and to relieve courts from technical questions arising from contentions that the evidence shows the commission of one of these crimes other than that alleged in the information. It has been specifically held that where an information charged the defendant with the crime of theft by feloniously taking money or property belonging to the complaining witness, that theft by means of what is generally known as embezzlement was included within the information and proof of such was admissible under the allegations of the

information and would sustain a conviction under its terms. (*People* v. *Fewkes,* 214 Cal. 142 (4 Pac. (2d) 538); *People* v. *Murakami,* 122 Cal. App. 221 (9 Pac. (2d) 583).)"

See also:

People vs. *Roth,* 137 Cal. App. 592, 601; 31 P. (2) 813;

People vs. *Bratten,* 137 Cal. App. 658, 659; 31 P. (2) 210;

People vs. *Breyer,* 139 Cal. App. 547, 550; 34 P. (2) 1065, 1067.

So also *People* vs. *Brock* (1937), 21 Cal. App. (2d) 601, 608; 70 P. (2) 210:

"The effect of section 484 as it now appears is merely to amalgamate the crimes of larceny, embezzlement, false pretenses, and kindred offenses under the cognomen of theft. (*People* v. *Myers,* 206 Cal. 480, 483 (275 Pac. 219); *People* v. *Bratton,* 125 Cal. App. 337, 341 (14 Pac. (2d) 125).) Respondent in charging that appellant had committed the crime of grand theft was not required to allege expressly the kind of grand theft of whose commission he was accused. (*People* v. *Fewkes,* 215 Cal. 142, 149 (4 Pac. (2d) 538).) It was sufficient to allege generally an accusation of grand theft and if the evidence produced in support of the charge established that appellant had committed the crime of embezzlement and that the court wherein the cause was tried had jurisdiction of the action appellant's primary contention which is directed to the matter of venue is not sustainable."

As was said in *People* vs. *Jackson,* 24 Cal. App. (2) 182, at page 203:

> "However, as has been heretofore pointed out, the effect of section 484 of the Penal Code as it now reads is merely to amalgamate the crimes of larceny, embezzlement, false pretenses, and kindred offenses under the cognomen of theft. (*People* v. *Myers,* 206 Cal. 480, 483 (275 Pac. 219); *People* v. *Bratton,* 125 Cal. App. 337, 341 (14 Pac. (2d) 125); *People* v. *Brock,* 21 Cal. App. (2) 601 (70 Pac. (2d) 210).) There is no inconsistency between sections 484 and 532 of the Penal Code and the applicable provisions of the former have in effect repealed the identical provisions of the latter. (*People* v. *Carter,* 131 Cal. App. 177, 182 (21 Pac. (2d) 129).)."

Turning now to the case of *People* vs. *Robinson,* 107 Cal. App. 211; 290 Pac. 470, referred to in the instant decision as conclusive upon the point, we find that the question has long since been squarely decided and settled by the courts of California. We quote from that decision, at page 217:

> "Section 950 of the Penal Code requires that the indictment contain a statement of the acts constituting the offense in ordinary and concise language and in such manner as to enable a person of common understanding to know what is intended, and section 952 of the same code provides that in charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another. *Due process of law requires only that the accused be given sufficient notice of the nature of the charge*

against him (*Rogers* v. *Peck,* 199 U. S. 425 (50 L. Ed. 256, 26 Sup. Ct. Rep. 87); *Garland* v. *Washington,* 232 U. S. 642 (58 L. Ed. 772, 34 Sup. Ct. Rep. 456)) *to the end that he may prepare his defense and plead the judgment as a bar to any subsequent prosecution for the same offense (United States* v. *Simmons,* 96 U. S. 360 (24 L. Ed. 819)). *The state, however, has the right to establish forms of pleading to be observed in its own courts, subject only to the provisions of the federal Constitution involving the protection of life, liberty and property in all the states (Ex parte Reggel,* 114 U. S. 642, 651 (29 L. Ed. 250, 5 Sup. Ct. Rep. 1148, see, also, Rose's U. S. Notes)), and in *People* v. *Nolan,* 144 Cal. 75 (77 Pac. 774), where the defendant, an accomplice, was charged in the information as a principal in conformity with section 971 of the Penal Code, it was held that the pleading was sufficient notice of the nature of the accusation to satisfy the requirements of the federal Constitution. The same objection to an information which followed the provisions of section 951 of the same code was made and overruled in *People* v. *Burdg,* 95 Cal. App. 259 (272 Pac. 816), and it was held in the following cases that an indictment charging grand theft in the statutory form gave the defendant all the information necessary as to the nature of the accusation and that proof of any one of the species of theft named in section 484 of the Penal Code is sufficient to sustain the charge (*People* v. *Plum,* 88 Cal. App. 575 (263 Pac. 862, 265 Pac. 322); *People* v. *Campbell,* 89 Cal. App. 646 (265 Pac. 364; *People* v.

Lalor, 95 Cal. App. 242 (272 Pac. 794); *People* v. *Wickersham,* 98 Cal. App. 502 (277 Pac. 121)). The amendment to section 484 (Stats. 1927, p. 1046) in connection with other cognate legislation, such as amendments to sections 951 (Stats. 1927, p. 1043) and 952 (Stats. 1927, p. 1043; Stats. 1929, p. 303) of the Penal Code, was designed to simplify procedure (*People* v. *Myers,* 206 Cal. 480 (275 Pac. 219)). And the effect of section 484 is to merge the former crimes of larceny, embezzlement, and obtaining property by false pretenses into the one crime of theft (*People* v. *Plum, supra; People* v. *Palmer,* 92 Cal. App. 323 (268 Pac. 417)).

There is nothing in this legislation which deprives the accused of his rights under the section of the article of the Constitution upon which appellant relies, namely, the right to appear and defend, or which supports the contention that a judgment based upon pleadings in the statutory form would be an insufficient protection against another prosecution."

The case of *People* vs. *Berg,* 96 Cal. App. 430, 432, contains this definite language:

"It is contended that sections 951 and 952 are in violation of that portion of the fourteenth amendment to the constitution of the United States to the effect that no one shall be deprived of his liberty without due process of law, but we think it plain that they are not. We think the constitution of the United States requires no more specific statement of the nature of appellant's alleged offense than that contained in the information."

In *People* vs. *Covington,* 1 Cal. (2d) 316; 34 Pac. (2d) 1019, the Supreme Court of California says, at page 319:

> "'In support of the appeal the first point suggested is that the information failed to charge the offense of robbery, or any public offense. By the direct terms of the information the defendants were, in general terms, accused of the crime of robbery. But it is contended that the accusation, a substantial part of which we have quoted, is insufficient to allege a public offense "in that it does not contain words sufficient to give the accused notice of the offense of which he is accused." In other words it is contended that the information does not comply with the requirement of Penal Code, section 950, that in charging an offense each count shall contain a "statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended." But the rule governing this requirement is more particularly stated in section 952, as amended in 1927, and further amended in 1929. Among other things, it is there provided that the statement that the accused has committed the specified public offense "may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused." We think that the information charged commission of the crime of robbery in terms which sufficiently com-

ply with the requirements of the code. *The state has the right to establish forms of pleading to be observed in its own courts, subject only to the provisions of the federal Constitution involving the protection of life, liberty and property in all the states.* (*People* v. *Robinson,* 107 Cal. App. 211, 217 (290 Pac. 470).) *This fact disposes of the contentions of appellants that their conviction under this information is in violation of their constitutional rights. . . .*'"

In the case of *People* vs. *Ilderton* (1936), 14 Cal. App. (2d) 647, 649; 58 P. (2d) 986, the Court holds that "the question is no longer debatable":

"Defendant * * * raises four grounds for reversal of the order.

(1) That section 952 is unconstitutional because it does not require a full statement of the particulars of the offense so that the defendant may know whether he is charged with larceny, embezzlement, obtaining money by false pretenses, or with any of the other unlawful means of taking the property of another. *The constitutionality of the section has been sustained repeatedly and the question is no longer debatable.* (See *People* v. *Robinson,* 107 Cal. App. 211, 217 (290 Pac. 470).)."

That states may regulate procedural matters in their own courts, subject only to well-known provisos, is fundamental.

The leading cases are all in conformity upon the four general requisites with which due process is concerned. They are as follows:

(1) Notice of some charge or charges being brought against the defendant;

(2) The hearing pursuant to said charges;

(3) Before some court or board having jurisdiction of the charge or charges; and

(4) The orderly process of the trial or hearing according to the equal protection of the laws. That is to say, the laws under which the particular defendant is being tried must be of equal importance to all other citizens who might come before the same tribunal on the same charges.

Jordan vs. *Massachusetts* (Mass. 1912), 225 U. S. 167; 32 S. Ct. 651; 56 L. Ed. 1038.

The state has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the federal constitution.

Brown vs. *New Jersey* (N. J. 1899), 175 U. S. 175; 20 S. Ct. 77, 44 L. Ed. 119;

Roller vs. *Murray* (W. Va. 1914), 234 U. S. 738, 34 S. Ct. 902, 58 L. Ed. 1570.

If the Supreme Court of a state has acted in consonance with the constitutional laws of the state *and its own procedure,* it could only be in very exceptional circumstances that the Supreme Court of the United States would feel justified in saying that there had been a failure of due legal process. The

party must have been deprived of one of those fundamental rights the observance of which is indispensable to the liberty of the citizen.

Allen vs. *Georgia* (Ga. 1897), 166 U. S. 138, 17 S. Ct. 525, 41 L. Ed. 949.

From our schoolboy days we were told by learned professors of the twilight zones of shaded difference between these three related crimes. In the interests of progress and of streamlining legal procedure many states have amalgamated the three felonies. That such a step is constitutional there can be no doubt. The exaltation of form is no longer an attribute of law. The bogies of technical pleading are being forced into extinction by lawyers and judges of substance.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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